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~~Nos. 810 and 861~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT PITTSBURGH PLATE GLASS COMPANY

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STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix.

QUESTION PRESENTED

The primary question presented here may be stated as follows:

> Does Section 8(a)(5) of the Act require an employer, as a mandatory bargaining obligation, to negotiate with the union representing his active employees with respect to retirement benefits for persons who have previously retired from his employ?
>
> Subsidiary to this question are the following:
>
> (1) Are retired persons "employees" of this employer after their retirement within the meaning of Section 8(a)(5) and 9(a) of the Act?
>
> (2) Are retired persons properly a part of and included in the appropriate bargaining unit for which bargaining is required by Section 8(a)(5) of the Act?
>
> (3) Can a union selected by and certified to represent the active employees in a defined bargaining group or "unit" also represent retired persons?
>
> (4) Can a union claim the exclusive authority under the Act to bargain for persons who have no voice in the selection or decertification of the union, no voice in internal union decisions, and no voice in the negotiation and ratification of labor agreements?

STATEMENT OF THE CASE

This case arose as a result of events occurring at the Barberton, Ohio, plant of the Company in March 1966.

A. STATEMENT OF FACTS

The Board's statement omits some important facts, and erroneously creates the impression that the Company has since 1950 periodically negotiated benefits or

changes in benefits for persons who had previously retired. This is in error. Except for one occasion in 1964, all benefits negotiated were prospective and applied to active employees to take effect upon their retirement. A brief review is in order.

1. Background of Certification of Unit and Union Status of Retirees

(1) The Union was certified on February 7, 1949, as the representative of employees of the employer at its Barberton, Ohio, plant. The employee unit established by the Board as appropriate for bargaining under Section 9(b) of the Act was described as:

> "All employees of the Employer's plant and limestone mine at Barberton, Ohio, working on hourly rates, including group leaders who work on hourly rates of pay, but excluding salaried employees and supervisors within the meaning of Section 9(b) of the Act . . ." (G. C. Exh. 2; A. 112, 118)

The Union was certified pursuant to an election among the employees in this unit. In this election only employees on the active payroll were eligible to vote. Retired persons were not eligible and did not vote in the election (G. C. Exh. 2; A. 112, 118). In a subsequent election held in November 1970, the Board again excluded retirees. All collective bargaining agreements negotiated since the certification have contained the same unit description (G. C. Exh. 6; A. 89, 121).

(2) Retired persons cannot vote in internal union elections or in the election of union officers or negotiating committees. Nor can they, under the Union's constitution and by-laws, vote on a labor contract ratification. They are only "honorary members" with no participating or voting rights in the union (A. 139-140).

(3) In 1966, there were approximately 190 persons formerly employed at the Barberton plant who were retired and on Company pension (A. 170). Many reside in Ohio, but some live in several other states and some in a foreign country (A. 166). Retired people are not continued on any employer seniority list, and, since the pension plan provides for mandatory retirement at age 65, they have no expectation of re-employment (G.C. Exh. 4; A. 62, 120). Those who retire at an earlier age have no re-employment rights (A. 164). The same is true of those who retire for disability (A. 164-165).

2. Background of Bargaining on Retirement Benefits

From time to time since 1950, the Company and Union have negotiated retirement benefits for the active employees to take effect upon their retirement. The Company maintained throughout, however, that it was not required to renegotiate changes in retiree benefits after retirement.

The Company was willing to consider voluntary improvements in retiree benefits after retirement and, in fact, did so on several occasions.

In 1950, the Company verbally agreed to allow persons who later retired to participate in the medical program (A. 116). In 1954, the Company unilaterally improved the medical benefits for retired employees (A. 151). In 1960, the parties negotiated an upgrading in the medical plan, but the negotiated increase in benefits applied only to persons retiring after the effective date of the agreement (A. 151-152). Then, in 1962, the Company agreed to contribute $2.00 per month toward the cost of medical insurance, but only for employees who retired after June 27, 1962 (A. 118).

In 1964, the Company agreed to increase the $2.00 per month contribution to $4.00 per month, with express understanding that if Medicare were adopted, the contribution would revert to $2.00 per month (G.C. Exh. 5; A. 88, 121). This was the only time an agreement was made that affected benefits of persons already on retirement.

That set the stage for the 1966 events at issue in this case.

3. The Events in 1966

In March 1966, the Company informed the Union that, after extensive study of its medical plan for retirees, it had decided to discontinue the medical insurance plan for retirees because the plan contained non-duplicating features which rendered it valueless in view of Medicare. To assure the continuance of medical benefits, the Company proposed to contribute $3.00 per month for each eligible retiree to cover the cost of Medicare (A. 158-161).

When the Union objected to cancellation of the medical insurance, the Company reconsidered and notified the Union on March 23 that it had decided to leave the medical insurance plan intact. In addition, the Company notified the Union that it intended to offer each retiree the option of continuing under the medical plan or withdrawing and receiving a $3.00 per month contribution to Medicare (A. 177-178).

The Company spokesman called attention to the March 31, 1966, deadline for Medicare enrollment. The Union requested and was furnished a copy of the letter to retirees (A. 178).

Fifteen retirees elected to accept the contribution to Medicare; the others elected to remain under the existing medical plan (A. 146).

The Union filed charges with the NLRB.

B. DECISIONS OF THE TRIAL EXAMINER AND THE BOARD

1. The Trial Examiner's Decision

The Trial Examiner found no violation of the Act and recommended dismissal of the case.

The Examiner found that the retirees were not "employees" and not members of the bargaining unit within the meaning of Section 8(a)(5) and 9(a) of the Act, and held, therefore, that while bargaining for retirees is permissible, it is not mandatory under the Act.

He further found that by providing an option to retirees to exercise as they saw fit, the Company had not unilaterally modified its agreement with the Union within the meaning of Section 8(d) of the Act (A. 9-25).

2. The Board Decision

The Board majority reversed the Examiner. The Board based its reversal on these grounds:

> (1) That retirees are "employees" within the meaning of Section 2(3) of the Act; and,
>
> (2) That, even if retirees are not "employees", there is a mandatory obligation on the employer to bargain retiree benefits because such benefits "vitally affect bargaining unit employees".

The Board accordingly ruled that bargaining with respect to retirees and their benefits was mandatory

under the Act, and that, by granting the Medicare option to the retirees, the Company violated its bargaining obligation under the Act (A. 25-48).

3. The Dissenting Opinion of Member Zagoria

Member Zagoria questioned both the legal basis and the wisdom of the majority opinion.

On the question of legality, he found:

> (1) That since retirees are no longer working for the employer, are not on the payroll, and have no access to the plant or expectation of recall, their status is best described as "pensioners" rather than "employees".
>
> (2) That apart from their lack of employee status, retirees are uniformly excluded from voting in Board elections and are clearly not a part of the bargaining unit; and
>
> (3) That retirees have no vote or voice in the Union and no standing to initiate a decertification petition.

Member Zagoria concluded that, in view of these facts, the Act gave the Union no authority or duty to represent retirees and imposed no obligation on the employer to bargain about them with the Union.

Zagoria expressed concern with the "far reaching implications of the majority decision," pointing out that the Board was "going beyond anything it has said or done in other types of cases."

He further pointed out:

> (1) That in most respects retirees are in no different status than individuals who leave the bar-

gaining unit for other reasons and the scope of the majority ruling was difficult to define and to limit;

(2) That the majority opinion would have an adverse affect on the stability and finality of labor agreements. An oft-cited advantage of collective bargaining, he said, is that it results in a specific agreement setting out a firm package of benefits for a fixed period. This allows employers to base their prices and general business policy on these agreements and the worker to insist on exact payment of the agreed upon wages and benefits. If mandatory renegotiation of agreements is required, either party, years later, could reopen the benefits and "unravel the terms;"

(3) That bargaining is a "two-way street" and retiree benefits could be bargained up or down;

(4) That the majority opinion posed and left unanswered a host of difficult questions, such as the effect of a change in bargaining agent after employees retired from the unit, the problem of conflict of interest and fair representation, the application to retirees of union-security agreements, and the like.

Finally, Member Zagoria referred to representations made to the Board by Union *amici* citing examples of voluntary bargaining for retired workers. He commented that these voluntary arrangements are a "tribute to the humanistic quality of an enlightened labor-management relationship," but that to hold these matters to be the subject of mandatory bargaining was in his judgment beyond the intent of the Statute (A. 48-52).

C. DECISION OF THE COURT BELOW

The court below set aside the Board's order, and later denied a motion for reconsideration, *en banc*. The court held that retirees are not "employees" within the meaning of Section 8(a)(5) and are not members of the unit for bargaining to which the bargaining obligation is limited under the Act. The court further found without foundation in the Statute the Board's alternative argument that, even if not employees, retiree benefits are subject to mandatory bargaining because these benefits "affect active employees."

The Court of Appeals defined the issue as follows:

> "The issue is, once retirement benefits have been negotiated for active employees who have retired and begun collecting benefits, whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are 'employees' under Section 8(a)(5), changes in whose benefits must be collectively bargained with the union." (A. 190-191).

On the "employee" issue, the court found that, while Section 2(3) of the Act defines the term "employee" in general terms, this section also provides that this broad definition shall give way where the Act explicitly provides otherwise. The court then turned to Section 8(a)(5) and found that this section defines the bargaining obligation and limits the employer's obligation to "his employees" and no others. The court commented that as long ago as *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), this Court recognized the limiting effect of Section 8(a)(5) (A. 191-193).

The court below then considered the various arguments made by the Board for a more expansive definition of "employee" by analogy to cases, statutes, and regulations where the term "employees" had for some

special purposes been defined to include persons no longer serving an employer and found them explained on grounds not applicable to the bargaining obligation (A. 194-195).

The court then examined the evidence in this case and found on the facts that employment with this company was a complete and final severance of employment, and none of the normal and traditional attributes of employment pertained. The court therefore held that the retirees are not employees of this employer for purposes of Section 8(a)(5) (A. 195).

The court further found that Section 8(a)(5) and Section 9(a), read in combination, limit the scope of mandatory bargaining to the bargaining unit, and that pursuant to uniform Board policy retirees had been excluded from the bargaining unit certified by the Board at this plant. Based on these findings, the court held that retirees were not a part of the bargaining unit (A. 195-197).

The court also considered and rejected the Board's alternative argument that, even if retirees are not employees under the Act, their retirement benefits are mandatory subjects of bargaining because their retirement benefits "vitally affect active bargaining unit employees."

The court held that what active employees are legitimately concerned with are their own retirement benefits, and that it is not necessary to extend the bargaining obligation to employees already retired in order to insure active employees the right to negotiate their own retirement benefits and to protect those benefits after retirement (A. 197-199).[1]

---

[1] Contractual retirement benefits are enforceable in the courts as the court below found. *Upholsterers' Union* v. *American Pad Co.*, 372 F. 2d 427 (C.A. 6, 1967).

Finally, the court held that the Board's arguments were in defiance of the Act's purpose to reconcile and equalize the power of competing economic forces in order to encourage the making of voluntary agreements and prevent industrial strife. The court found that retired employees, being detached from employment and possessing no vote or influence in the Union have "no economic or bargaining power in this system." The court also expressed the fear of relegating earned retirement benefits to the bargaining process in which the retirees as a group could exert no real economic power (A. 199-200).

The court referred to representations made by the Board and various Union *amici* claiming that bargaining for retirees is a common industry practice. The court found that, while such voluntary arrangements were to be encouraged, they could not supply the basis for altering the statutory language or undermining the congressional intent (A. 200).[2]

SUMMARY OF ARGUMENT

1. The issue in this case does not relate to the proper subjects for bargaining but to proper identification of the unit for which bargaining is authorized and required by the Act. Under Sections 8(a)(5) and 9 of the Act, the union's bargaining authority and the employer's bargaining obligation are limited to the employees of the particular employer who are members of the unit established as appropriate for bargaining

[2] A commentator who reviewed the lower court's ruling concluded that it reached the correct result. Comment, 39 U. Cinn. L. Rev. 573 (1970). Prior to the court's decision, others had questioned the result reached by the Board majority. See Comment, 68 Mich. L. Rev. 757 (1970); Note, *Retirees' Status as "Employees" Under NLRA*, 43 Temple L. Quarterly 373 (1970); Comment, 44 Tulane L. Rev. 605 (1970).

purposes. Since retirees have permanently severed their employment, have no expectations of recall, perform no services and are paid no wages, they are not employees of the employer after their retirement and cease to be members of the bargaining unit. The bargaining unit controls the scope and extent of the bargaining obligation. Therefore, while bargaining over retiree benefits is permissive, it is not mandatory under the Act.

2. The Board's alternative argument that, even if retirees are not employees, the union representing active bargaining unit employees represents and has the exclusive right to compel bargaining for retirees after their retirement finds no sanction in the Act. This unprecedented contention is a threat to the entire bargaining structure enacted by Congress and constitutes a serious inroad upon the bargaining unit concept. It conflicts with the Board's own precedents and those of the courts defining the bargaining obligation.

3. The bargaining unit has incidents which the Board cannot ignore. It not only defines and limits the employee group for whom the employer must bargain; it also defines the limits and extent of the union's authority as bargaining agent. The bargaining unit is the constituency which, under Section 9, elects the bargaining representative for the unit and controls the bargaining policies of the unit representative, including the ratification of labor agreements applicable to the unit. Retirees play no part and have no voice or economic power in this system. The Board has uniformly excluded retirees from bargaining units under Section 9, and in two elections at this very plant has excluded them from the unit and from voting on the selection of the Union as bargaining agent for the unit.

Similarly, retirees are mere "honorary" members of the Union, have no vote or voice in its affairs or in the ratification of agreements. Nonetheless, and paradoxically, the Board seeks to treat them as a captive appendage to the bargaining unit, making them subject to the control of the unit representative but denying them a voice in its selection and in its bargaining policies.

4. The Board has put forth an entirely new concept of "interest" bargaining which has no statutory basis. The Board concedes that the court below was correct in holding that it is not necessary to extend the bargaining obligation to persons already retired in order to insure active employees the right to negotiate their own retirement benefits and negotiate binding commitments that these benefits will in fact be paid. The Board's attempt to justify mandatory bargaining for retirees after their retirement on the ground that their benefits "vitally affect active employees" is unsound and at odds with the statute.

5. The Board's ruling, as Member Zagoria held, has implications which are far-reaching and go beyond the issue of mandatory bargaining for retirees. If given its logical extension, the concept of "interest" bargaining will spawn union claims to mandatory bargaining rights for various classes of persons outside the bargaining unit on the ground that the wages and benefits of such persons affect employer funds available for wages and benefits for unit employees. The concept, therefore, will engender uncertainty, controversy and disputes.

It will also create issues as to the finality and stability of labor agreements, and impose unfair burdens

on employers. This is because it is explicit in the Board's ruling that retirement benefits are subject to repeated compulsory renegotiation long after the employee has retired. As the court below and Member Zagoria found, this view of the bargaining obligation as it applies to retirement benefits will encourage attempts to unravel the terms of the past agreements and the package of benefits with which employees retire and thus subject the employer to repetitive demands for retroactive renegotiation of the value of past employee services, which had been the subject of mutual agreement before the employee retired. The employer cannot retroactively adjust his prices to meet this obligation which would be interminable and open-ended.

6. The Board and Union *amici* place great stress on representations that bargaining for retirees is a common industry practice. Employer *amici* challenge the universality or generality of the alleged practice. The court should view with caution *ex parte* representations as to practice in a field as complex as this. Among other problems, it is easy to confuse bargaining retirement benefits for active employees and bargaining for retirees after their retirement. We have no doubt that some companies, as a matter of good labor relations policy, do discuss retiree benefits with the unions and some also make agreements or reach understandings relating to them, all on a voluntary and permissive basis without recognizing a mandatory obligation. Other companies on their own initiative make improvements from time to time in the benefit levels of retired workers.

In any event, the voluntary practices of some do not and should not form a legal basis for imposing a mandatory obligation on all.

The decision of the court below does not interfere with or inhibit the development of these voluntary arrangements. The fact that this issue of mandatory bargaining for retirees came before the Board for decision for the first time after the Act had been operative for almost 35 years suggests that the issue has not been a matter of great controversy in the past, and wisdom may suggest that the matter be left to the voluntary accommodations that appear to have worked so well up to now.

ARGUMENT

I.

BARGAINING UNDER THE ACT IS LIMITED TO EMPLOYEES OF THE EMPLOYER AND CONFINED TO THE APPROPRIATE BARGAINING UNIT

A. Under Section 8(a)(5) of the Act an Employer's Bargaining Obligation Is Limited to "His Employees"

Since the inception of the Act it has been clearly understood that mandatory bargaining is limited to employees of the employer and confined to units of employees established as appropriate for bargaining. We deal here with the first requirement.

It is difficult to conceive of any meaningful bargaining which does not revolve around the employer-employee relationship. Collective bargaining is an ongoing process and a mechanism for determining the wages, hours, and conditions under which persons are employed, and its purpose is to encourage the making of stabilizing agreements and minimize strikes and lockouts which would burden trade and commerce. While the benefits workers are to receive upon retirement are encompassed in the bargaining, it is recognized that these benefits are in the nature of deferred

wages for services currently being performed when the collective agreements are negotiated. To hold as the Board did that the mandatory bargaining relationship follows a worker into his retirement and that his benefits or deferred wages continue to be subject to mandatory renegotiation, *ad infinitum,* is a novel concept which we believe to be alien to the entire philosophy of collective bargaining as envisioned by Congress and as practiced in an industrial society.

Congress in constructing the collective bargaining provisions of the Act was careful to define the obligation in terms of the employer-employee relationship. Section 8(a)(5) provides:

> "Section 8(a) It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

The plain language on 8(a)(5) limiting the employers bargaining obligation to "his employees", as we shall show, is reenforced and complemented by the provisions of Section 9 relating to the bargaining unit for which bargaining is required. Thus, for example, under Section 9(a), the bargaining representatives' exclusive bargaining authority is limited to the appropriate bargaining unit, and under Section 9(b), the largest unit that the Board can legally establish, (except that by consent of the parties only, a multiemployer unit may be established) is an employer unit.

The Board in its decision and brief places heavy reliance on the decision of this Court in *Phelps Dodge*

Corp. v. *NLRB,* 313 U.S. 177 (1941), arguing that the term "employee" is infinitely elastic and that wide discretion is given the Board to define the term on the basis of the "underlying economic facts."

This argument, however, has several flaws. The Court in *Phelps Dodge* was dealing with a case involving discrimination in hiring under Section 8(a)(3), where the broad generic definition of "employee" in Section 2(3) applied. But, in *Phelps Dodge,* the Court recognized that a different definition was applicable to the bargaining obligation. The Court pointed out that Section 2(3) contains a limiting phrase which makes the general definition inapplicable where "the Act explicitly states otherwise."

In specific reference to Section 8(5) [now 8(a)(5)], the Court said:

> "In determining whether an employer has refused to bargain collectively with representatives of 'his employees' in violation of Section 8(5) and Section 9(a), it is of course necessary to determine who constitute 'his employees.' One aspect of this is covered by Section 9(b) which provides for determination of the appropriate bargaining unit." 313 U.S. at 192.

Thus, the Court in *Phelps Dodge* by this statement made plain its understanding that the bargaining obligation in Section 8(a)(5) was not subject to the generic definition of 2(3) but was limited to employees of the particular employer and also to the bargaining unit as determined under Section 9.

The Board itself has recognized that Section 8(a)(5) incorporates a restrictive meaning of the term "em-

ployee." In *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 163, n. 5 (1959), the Board said:[3]

> "We do not regard as controlling for purposes of determining for whom an employer must bargain those cases cited . . . which hold that the anti-discrimination provisions of Section 8(a)(3), (4), and (b)(2) of the Act forbid discrimination against applicants for employment. The anti-discrimination provisions refer to 'employee' *generally,* whereas, unlike those provisions, Section 8(a)(5) contains specific language requiring an employer to bargain for '*his* employees'." (emphasis in original)

The Board made the same distinction in *Briggs Mfg. Co.*, 75 NLRB 569 (1947) and in *Piasecki Aircraft,* 123 NLRB 348 (1959). The decision in *Piasecki* was enforced by the Third Circuit court with this statement:

> "It [the Board] recognized the distinction in Section 8(a)(5) wherein an employer is required to bargain in good faith with representatives of '*his employees*' and held that the Bellanca workers were not his [Piasecki's] employees within the meaning of that Section." *Piasecki Aircraft Corporation* v. *NLRB,* 280 F. 2d 575, 589 (1960) (emphasis in original).

---

[3] The Board in its brief below argued that *Page* had been overruled by the Board in *Chemrock Corporation,* 151 NLRB 1074 (1965). *Chemrock* was a case where the Board held that a successor employer taking over a going enterprise was obligated to take over the predecessor's employees and on-going bargaining relationship. The Board overruled *Page* only to the extent it conflicted with the *Chemrock* decision. 151 NLRB at 1080, n. 8. The court below considered *Chemrock* and found that it dealt with "facts and issues entirely different from those present here" (A. 193, n. 12).

Until this case arose, neither the Board or any court has questioned this interpretation of Section 8(a)(5) or claimed that an employer was obligated by law to negotiate for persons who are not "his employees" and not a part of the unit for bargaining as defined in Section 9(a). As we shall later argue, the Board's primary argument here—that, even if retirees are not employees, and not in the bargaining unit, there nevertheless exists a mandatory obligation to renegotiate their retirement benefits—is at war with this well-established principle.

B. Mandatory Bargaining Under the Act Is Confined to Established Bargaining Units

In further limitation on the bargaining obligation, the Act mandates that bargaining will be conducted in well-defined units found appropriate for bargaining under Section 9 of the Act.

Section 8(a)(5) of the Act is made subject to Section 9(a).

Section 9(a) provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ."

Section 9(a), therefore, imposes the added condition that for employees to be covered by the bargaining obligation they must be "in" or a part of a unit of employees found appropriate for the purposes of collective bargaining under that Section.

The Board and courts have held that the scope of the bargaining unit limits the extent of the bargaining obligation, and, as a necessary corollary, an employer is under no duty of, nor does the union have any right to compel, bargaining for persons or employees not within the unit appropriate for bargaining purposes. See, e.g., *Food Store Employees Union, Local 347* v. *NLRB,* 422 F. 2d 685, 688-689 (C.A.D.C. 1969); *Local 1325, Retail Clerks* v. *NLRB,* 414 F. 2d 1194, 1205 (C.A.D.C. 1969); *NLRB* v. *Campbell Sons' Corp.,* 407 F. 2d 969, 975-979 (C.A. 4, 1969); *NLRB* v. *Solis Theatre Corp.,* 403 F. 2d 381, 382-383 (C.A. 2, 1968); *NLRB* v. *Sandy's Stores, Inc.,* 398 F. 2d 268, 271-273 (C.A. 1, 1968); *Colecraft Mfg. Co.* v. *NLRB,* 385 F. 2d 998, 1005-1008 (C.A. 2, 1967); *Eastern Greyhound Lines* v. *NLRB,* 337 F. 2d 84 (C.A. 6, 1964); *Ainsworth Mfg. Co.,* 131 NLRB 273, 48 LRRM 1029 (1961).

The Court in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 666 (1965), took note of the Board's rule that bargaining was confined to the bargaining unit, and held that it is the duty of the parties to bargain "unit by unit" and on no other basis.

In *Douds* v. *International Longshoremen's Assn.,* 241 F. 2d 278 (C.A. 2, 1957), the Court found a union in violation of the Statute by demanding bargaining for employees outside the unit certified by the Board. The Court concluded that the unit as certified by the Board could be changed only by further action of the Board or agreement of the parties and that it was impermissible for "one party over the objection of the other [to demand] a change in that unit." 241 F. 2d at 283.

The District of Columbia Circuit held in *I.L.A.* v. *NLRB,* 277 F. 2d 681 (C.A.D.C. 1960), that "while the

present certification remains outstanding it should control the legality of the bargaining process." 277 F. 2d at 682. See also, *Electrical Workers Union, Local 59,* 119 NLRB 1792, 41 LRRM 1392 (1958), *enf'd, NLRB* v. *IBEW,* 266 F. 2d 349 (C.A. 5, 1959), and *District 50, United Mine Workers,* 142 NLRB 930, 53 LRRM 1178 (1963).

The positioning of retired people in or out of the appropriate unit is therefore crucial to this case. For, if they are not a part of the bargaining unit under Section 9(a), there is no mandatory obligation, or right to bargain for them under Section 8(a)(5).

The reason for the nexus between Section 8(a)(5) and Section 9(a) is plain. The composition of the bargaining unit controls the legality and scope of the bargaining and the eventual agreement. The subject matter for bargaining are the wages, hours, and conditions of the unit employees. Within that range, the bargaining has a wide scope, but the employees on behalf of whom the bargaining is conducted and the agreement made are those employees who have been established as members of an appropriate unit for bargaining. The bargaining covers only those employees and no others, and the same is true of the agreement as well. That has been the uniform practice since the inception of the Act.

In this structure, the employer's bargaining obligation is coextensive with the bargaining agent's authority. The bargaining agent's authority as exclusive representative is a very special status under the law. It is limited to the bargaining unit for it is the members of that unit who by majority voice, generally in a secret ballot election, have selected that union as their exclusive bargaining agent. Within that unit the employer

must deal with the union as representative and with no other, but the bargaining agent's authority as exclusive representative is bound by the confines of the unit. The restriction of the representative's authority to the unit which elects it is an essential element of industrial democracy and employee rights as guaranteed by the Act.

II.

INDIVIDUALS WHO HAVE PERMANENTLY RETIRED ARE NOT EMPLOYEES AND NOT WITHIN THE BARGAINING UNIT

The pertinent inquiry under the Statute is, in our view, solely a question of whether retirees after their retirement can fairly be said to be employees of this employer and members of the appropriate bargaining unit.[4]

We think it clear that permanent retirees do not meet these tests.

A. Retirees Are Not "Employees" of the Employer

As the court below found, retirement at this plant is a complete and final severance of employment. Upon retirement, employees are removed from the payroll and union seniority lists. Thereafter, they perform no services, are in no way under the control of the Company, earn no wages, are under no restrictions as to other employment or activities, and have no right or expectation of reemployment.

The Board did not find that retirees meet any of the normal indicia of employees, and, in fact, concedes that

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[4] We dispute the Board's claim of unilateral modification by the Company of an agreement on retiree medical insurance. The Company did not cancel or modify its agreement, but merely gave the retirees an additional option. If they wished to continue the medical insurance as per the agreement they were at liberty to do so, and most of them did.

when an employee retires "most of the threads which once bound him to the unit are severed . . ." (A. 34). This is clearly so. Upon retirement, the individual generally loses all contact with his place of employment and either goes into another job or business or finds a suitable place for his retirement. Moreover, in these times of optional early retirement, more and more persons upon retirement from one company find other gainful employment. The retired person no longer has any interest in wages, hours, or conditions in his former place of employment. Even under the most liberal test, he cannot be considered an employee of his former employer.

The Board, however, expresses the view that the retiree needs representation, and therefore argues that the term "employee" is elastic enough to be stretched to cover him to meet this social need.

The Board attempts to support its opinion by various analogies.

The Board argues—by analogy to applicants for employment, economic strikers, persons on military leave, hiring hall arrangements, persons on layoff status and the like—that coverage of the Act is not limited to employees currently in an active work status. This, of course, is true for certain purposes.

But, these analogies are not apt or persuasive on the specific issue here. These are all familiar situations in which the persons involved have either been unlawfully deprived of employment, have a normal expectancy of resuming active employment by reason of their retention of seniority in the unit, or a legal right under this Act or some other statute to maintain their employee status and reemployment rights. Thus, Section 8(a)

(3) protects the applicant for employment against discrimination, *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177 (1941); Section 2(3) expressly continues the employee status of economic strikers; and the Selective Service Act protects reemployment rights of persons in military service. The hiring hall case involved a situation where seniority rights and job preferences were established for a multi-employer group through a common source. Clearly, the conditions on which men were referred from job to job among the members of the multi-employer group was a mandatory bargaining subject. *NLRB* v. *Houston Chapter, Associated General Contractors,* 349 F. 2d 449 (C.A. 5, 1965), *cert. denied* 382 U.S. 1026. The successorship case was one in which the Board held that a successor employer succeeded to the bargaining obligation of its predecessor. *Chemrock Corp.,* 151 NLRB 1074 (1965). The recognition picketing case is not in point and is expressly covered by Section 8(b)(7) of the Act. *NLRB* v. *Local 542, International Union of Operating Engineers,* 331 F. 2d 99 (C.A. 3, 1964), *cert. denied,* 379 U.S. 889.

The court below considered these categories of cases and found them wholly inapposite. As the court said:

> "It is true that for many purposes the Act extends protection to persons not currently serving employers. However, by plain meaning an employer has no statutory duty to bargain collectively with respect to persons who are not 'his employees'." (A. 191-192).

As already noted, the Board itself has recognized this same distinction. *Page Aircraft,* 123 NLRB 159 (1959); *Piasecki Aircraft,* 123 NLRB 348 (1959), *enf'd.,* 280 F. 2d 575 (C.A. 3, 1960), *cert. denied,* 364 U.S. 933; *Briggs Mfg. Co.,* 75 NLRB 569 (1947).

The Board goes even further afield to find analogies for its expansive definition of "employee."

Citing three Court of Appeals decisions under Section 302 of another title of the Act, the Board asserts that in the light of these decisions it would lead to an anomaly to hold that retirees are not employees for bargaining purposes. *Blassie* v. *Kroger Company,* 345 F. 2d 58 (C.A. 8, 1965); *Teamsters* v. *Townsend,* 345 F. 2d 77 (C.A. 8, 1965); and *Garvison* v. *Jensen,* 355 F. 2d 487 (C.A. 9, 1966).

This is essentially a makeweight argument. What these decisions basically hold is that retired employees may under some circumstances be beneficiaries of trusts established for the benefit of employees and their dependents pursuant to certain exceptions to the provisions of Section 302 of Title III of the Act.

It would be an anomaly, indeed, if this were not so. But, these interpretations of a relatively obscure and narrow-purpose provision in another and separate title of the Act can provide no meaningful guide to the interpretation of so major a part of the Act as the provisions which establish the bargaining obligation.

Turning to the three Court of Appeals decisions, they all relate to an interpretation of Section 302, which is a criminal provision making it a misdemeanor for an employer to make payment to a union representing his employees. The Section makes an exception, however, where the payments are made into a jointly-administered trust fund for the benefit of employees. Two of the three Court of Appeals decisions dealt with certain aspects of the meaning of the term "employee" as used in this special context. No issue of collective bargaining was involved.

The Board has to a degree misconstrued the rulings. They do not hold that retirees are employees in any general sense. *Blassie* only holds that "a person for whom employer contributions are made prior to retirement is not barred from receiving benefits of the Trust after retirement . . ." 345 F. 2d at 68.

Garvison holds that an employer may continue to contribute to a trust for the benefit of an employee after his retirement. *Townsend* does not deal with the definition of an employee at all.

The administration of a trust is a fiduciary responsibility to be carried out in accordance with the terms of the trust instrument. This function is entirely separate and distinct from the negotiation of collective bargaining agreements and the representation of employees for bargaining purposes. The speculative difficulties which the Board's brief projects in separating and distinguishing these two wholly separate functions simply do not exist. These cases hold that it is permissive for an employer to make payments into these jointly administered trusts. They do not deal with mandatory bargaining at all.

To hold that the interpretation of Section 302 crosses over and controls the definition of the bargaining obligation under Section 8(a)(5) would, itself, be an anomaly, as the court below found.[5]

The Board relies on *NLRB* v. *Hearst*, 322 U.S. 111 (1944) to support its claim of virtually unrestrained discretion in interpreting the term "employee." In *Hearst*, the issue was whether newsboys were independ-

[5] There is likewise no persuasive parallel in the Internal Revenue Service view that a benefit plan may cover former as well as present employees.

ent contractors or employees, and the Court upheld the Board's ruling that they were employees. However, the Court, while finding that discretion was vested in the Board to depart to a degree from traditional common law concepts of master and servant, nevertheless held that the Board's application of the definition must be consistent with the Act's "terms and purposes." The Court also held that the Board's determination of employee status must have "warrant in the record," and a "reasonable basis in law." Here, we submit, the Board's attempt to hold retirees to be employees for bargaining purposes fits neither the terms nor the purposes of the Act nor has any reasonable basis on the record or in law.

Moreover, the Congress has since disapproved the broad sweep given to the term "employee" by the Board in *Hearst*.

House Report 245 on the Taft-Hartley Amendments in 1947, specifically criticized the Board's *Hearst* decision and the expansive interpretation given to the term "employees." While this was in the context of the employee-independent contractor controversy, the intent of Congress was to restrict the Board from extending the definition beyond the commonly accepted understanding of the term.

The Report states:

> "But in the case of *National Labor Relations Board* v. *Hearst* . . . the Board expanded the definition of the term 'employee' beyond anything that it had ever included before, and the Supreme Court, relying on the theoretic 'expertness' of the Board, upheld the Board . . . It must be presumed that when Congress passed the Labor Act, it intended words to have the meanings that they had

> when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there has always been a difference, and a big difference, between 'employees' and 'independent contractors.' *'Employees' work for wages or salaries* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, *Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings.''* H.R. 245 on H.R. 3020, 1 Legislative History of the Taft-Hartley Act 309 (G.P.O. 1948) (emphasis supplied)

The Conference Report followed the House in restricting the Board's definition of "employee."[6]

Clearly, the *Hearst* decision deals with a wholly different situation, and particularly in view of its subsequent history in Congress, provides no support for the Board's claim of virtually unreviewable powers to de-

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[6] Thus, in *NLRB* v. *Steinberg & Co.*, 182 F.2d 850, 854-855 (C.A. 5, 1950), the Court of Appeals commented on this legislative history as follows:

> ". . . the term 'employee' is not defined in the National Labor Relations Act, and the authorities have been at variance in the past as to the 'test' to be applied in determining whether or not an employment relationship exists under this and similar remedial legislative acts. However, the legislative history of the Taft-Hartley Law . . . shows quite clearly that when Congress passed the Labor Act it intended the word 'employee' to mean *someone who works for another for hire* and this clear expression of Congressional intent we are obligated to follow." (emphasis supplied)

This view has been expressly approved by two other circuits. *Site Oil Company of Missouri* v. *NLRB*, 319 F.2d 86, 93 (C.A. 8, 1963); *National Van Lines Inc.* v. *NLRB*, 273 F.2d 402, 403-404 (C.A. 7, 1960).

fine the term "employee" in a context wholly removed from the narrow issues surrounding the distinction between independent contractor and employee.

B. Retirees Are Not Members of the Bargaining Unit

The Board has uniformly excluded permanent retirees from all bargaining units and from voting in the election of a bargaining agent. In so doing, the Board has expressed doubts as to their employee status but grounded their exclusion primarily on the lack of community of interest with current employees. *Public Service Corporation of New Jersey,* 72 NLRB 224 (1947); *W. D. Byron & Sons,* 55 NLRB 172 (1944); *J. S. Young Co.,* 55 NLRB 1174 (1944). The Board's rationale was spelled out in *Public Service Corporation* as follows:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were considered as employees, we believe they lack a substantial community of interest with employees who are presently in the active service of the Employers." 72 NLRB at 229-230.

In this plant and in this very unit, which the Board first established and certified in 1949, and recertified in 1970, the Board included in the unit only those employees working on hourly rates, and, as the court below found, this operated to exclude retirees who were made ineligible and did not vote in the election to select the unit representative. While the Board has regularized procedures for amending and clarifying bargaining units, it has not attempted to act to re-

vise the certification to include retirees and has no intention of doing so. On the contrary, at a subsequent representation election in the same bargaining unit held on November 11, 1970, the Board again excluded retirees.

Presumably, the Board intends no change in this exclusionary policy since the Board's brief reaffirms the Board's long-standing position that retirees lack a sufficient community of interest with active employees to be included in their units or vote in Board elections (Board Brief, pp. 24-25).

In an attempt to rationalize its position, the Board appears to consider retirees as a sort of dangling appendage to the bargaining unit, not in it but not wholly detached from it. This approach does not square with anything in the statute.

The Board has, it appears, created a paradox. For, as Member Zagoria aptly stated:

> ". . . if an employee has sufficient interests to be included in the unit, he should be given a voice in the selection of a bargaining representative; if he is not given such voice, he should not be included in the unit." (A. 50).

We submit that the exclusion of retirees from the bargaining unit is, in and of itself, dispositive of this case. For, as the structure of the Act and the Board and court cases we have cited show, the bargaining unit controls the extent of the mandatory bargaining obligation.

If this were not so, chaos would be injected in the bargaining process, and the laudable objectives of Congress in defining bargaining units and mandatory bar-

gaining in those units would be lost. Unions could, and doubtless would, seek to use the bargaining unit as a convenient springboard from which to project and extend their bargaining authority outside and beyond the units they have been designated to represent.

III

THE BOARD'S "INTEREST" BARGAINING ARGUMENT IS CONTRARY TO THE ACT

The Board's primary contention in its brief is that bargaining for retirees is mandatory, regardless of the lack of employee status or unit membership, because their retirement benefits "vitally affects active bargaining unit employees (A. 38)."

The vice of this argument is that it seeks to cast aside the unit bargaining concept around which the bargaining obligation is structured and has developed in practice. As we have already shown, the Board and the courts have uniformly held up to now that the bargaining unit defines the boundaries of the bargaining obligation and controls the scope of the bargaining. Within the bargaining unit, the parties are required to bargain on a wide range of subjects and are permitted to bargain on a still wider range. But, the issue here is not subject matter, but scope, and the identity of the employee group for which the bargain is being made and to whom it will apply. What the Union seeks here is to demand bargaining authority to represent retirees and bargain their benefits for them. This the Act does not countenance, as the cases we have cited uniformly hold.

In its brief to the Court of Appeals, the Board conceded that "an employer is under no duty to bar-

gain for employees not within the bargaining unit." That concession was a correct statement of the prevailing law. In its brief before this Court, however, the Board now argues that the bargaining obligation encompasses "individuals outside the unit." (Board Brief, p. 13.)

This argument proves far too much. Its adoption would spell the end of the statutory concept of "unit by unit" bargaining which the court endorsed in *U.M.W.* v. *Pennington,* 381 U.S. 657 (1965). It would, as the court below found, inject an element of uncertainty in the scope of the bargaining agent's exclusive authority and lead to countless bargaining disputes. It would also give virtually limitless scope to the classes of persons for whom bargaining would be demanded and arguably required.

The Board appears to argue that control over retiree benefits by the representative of the active employees is required in order to protect their own interest in bargaining their own benefits. The court below found, however, that:

> "It is not necessary to extend the bargaining obligation to persons already retired in order to insure current employees the right to negotiate through their bargaining representative their own retirement benefits to take effect after their retirement." (A. 198).

As the court also pointed out, the current employees can negotiate binding safeguards to protect their retirement benefits and to assure that they will be administered and paid in accord with the terms and intent of their agreements. Given their collective economic strength and their statutory right to demand

bargaining on their own retirement benefits and on legally binding commitments that they be paid after retirement, there is simply no showing that active employees need have control over bargaining for retirees after they have retired in order to effectively bargain for and safeguard their own retirement benefits.

The Board makes several contentions designed to show that bargaining would be more meaningful and the prospect of agreement enhanced if the bargaining encompassed retirees (Board Brief, p. 18). We seriously question this statement, since it is more likely that broadening the scope of controversy and attempting to reopen and renegotiate the benefits with which employees have retired would tend to exacerbate the controversy and lead to many more bargaining deadlocks and disputes.

In deciding that bargaining for retirees was required, the Board expressed two primary but inconsistent concerns. One was that employees upon retirement would be "cast aside and forgotten" (A. 34). The other was that to the extent to which an employer voluntarily increases benefits for retirees, funds available for wages and benefits for active employees would be siphoned off (A. 39).

With respect to the first concern, the court below correctly held that prior to retirement, employees could bargain retirement benefits and obtain contract safeguards to guarantee their payment (A. 198).

With respect to the second concern, the court aptly pointed out that, while it was true that improvements in retiree benefits by the employer affected "the availability of funds available for active employees," this

was also true of a host of other employee expenditures such as wages and salaries paid non-union employees. However, the court held that this does not grant the unit representative authority to bargain the wages and salaries of other employees or supervisors or negotiate the amounts to be spent in dividends, capital expenditures, and the like (A. 198).

The Board argues in its brief that retiree benefits are regarded as a part of direct labor costs while the other types of expenditures mentioned by the court below are not so regarded. This is a highly questionable distinction since all available employer funds necessarily come from the same common source.

The Board also argues that active and retired employees are often covered by the same insurance contract, and that in some unexplained fashion the extension of mandatory bargaining to retirees is necessary to allow the use of a combined insurance plan. This is, of course, incorrect. Many company pension and medical plans cover both union represented and non-represented employees, and retirees and there is nothing in the court's decision that would alter or prohibit the continuance of such combined plans.

The same argument is made with respect to the funding of pension plans. There is no impediment to unions and employers periodically reviewing the funding of such plans to insure sufficient funding of benefits for active employees when they retire. In so doing they can take into account demands on the fund to pay benefits to persons already retired. This can be done without renegotiating these retiree benefits and is not affected by the decision of the court below.

The thrust of the Board's argument, that the benefits of persons already retired and future retirement benefits for current employees are inseparable, and must be treated as one for bargaining purposes, is simply contrary to the fact. There is no practical difficulty involved in fully negotiating retirement benefits for active employees without reaching back in time and renegotiating the benefits of those who have previously retired.

The Board cites the decisions of the Court in *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964) and *Teamsters* v. *Oliver,* 358 U.S. 283 (1959) to support its argument that mandatory bargaining can extend to bargaining for employees or other persons.

It is obvious, of course, that an agreement negotiated on behalf of the members of an appropriate unit can have an "effect" on persons outside that unit. All agreements limiting or prohibiting contracting out of unit work are in this category. But there are limitations on this when the unit representative goes beyond the legitimate objective of preserving work for the unit it represents. This *Oliver* type agreement is held justified because it is made on behalf of unit employees and is designed to protect *their* jobs from erosion by contracting out. But this is quite a different matter than claiming exclusive bargaining authority to negotiate *for* persons outside the unit.

Fibreboard and *Oliver* were both subcontracting cases and treated as such by the Court. In *Fibreboard,* all of the unit work was contracted out without prior notice to the union, and in *Oliver* part of the unit work of drivers was contracted out to owner-

drivers, thus curtailing *pro tanto* the job opportunities of the employee drivers. The clause in *Oliver* establishing the minimum rental to be paid owner-drivers was clearly designed to have the effect of reducing the economic incentive for contracting out unit work.

In neither *Fibreboard* nor *Oliver* did the Court hold that the unit representative's authority as exclusive bargaining agent encompassed bargaining for and on behalf of and entering into agreements for and on behalf of employees or other persons outside the unit which the representative was designated to represent.

A second important distinction is that, unlike the subcontractor employees in *Fibreboard* and the owner-drivers in *Oliver,* persons in permanent retirement do not compete in any way for unit work and in no way threaten the jobs or wage security of the active unit employees, or, for that matter, hamper to any degree their ability to negotiate their wages, hours, conditions, or retirement benefits. There can be no real doubt that, given their ability to shut down operations by a strike and their consequent superior bargaining leverage, the active unit employees can and do protect and advance their own bargaining interests on their own, and do not need to have control over the renegotiation of benefits for past pensioners in order to safeguard those interests.

The Board acknowledged this in its petition to the Court when it said:

> "To be sure, the union can negotiate a retirement plan for active employees alone and protect itself against breaches of that plan." (Board Petition for certiorari, p. 9.)

IV

THE REACH OF THE BOARD'S HOLDING IS NOT CLEAR AND THE HOLDING RAISES SERIOUS QUESTIONS WHICH THE BOARD DOES NOT ANSWER

Neither the Board's decision nor its brief attempt to define the limits of the decision or to answer the serious questions that will inevitably arise from this significant departure from the unit bargaining principle.

But these issues cannot be brushed aside as hypothetical, as the Board did in its decision and before the court below, for the Court is entitled to know the intended scope of the Board's ruling. It is the responsibility of the Board to provide a degree of certainty and stability, rather than inject confusion in the collective bargaining relationship.

Some of these issues were raised by Member Zagoria, and others flow logically from the grounds advanced for the Board's decision.

Left unsettled, but certain to arise, are such questions as:

(1) the right of retirees to select a separate representative, to institute a rival union petition or a decertification petition;

(2) the right of retirees to vote in representation elections;

(3) the right of retirees to vote in union elections and on ratification of labor agreements;

(4) the effect on retirees of a change in unit representative after their retirement;

(5) the question of whether the unit representative can demand a reduction in retiree benefits and strike for such a demand;

(6) whether the unit representative can demand pensions and benefits for employees not eligible for benefits when they left their jobs;

(7) the extent of a unit representative's authority to represent and bargain for various other classes of employees outside the bargaining unit; and

(8) the status of retirees under a union-security agreement and their obligation to pay dues.

It is to be anticipated that these and other issues stemming from the Board's decision would be spawned and create controversies which will occupy the Board and the courts for some time to come.

The Board's decision also raises a disturbing question as to its effect on the finality of agreements.

Clearly, what the Board is saying is that, after an employee has retired with the bundle of benefits which have been negotiated on his behalf and no longer is performing any work or services for his former employer, his benefits can be renegotiated again and again, without limitation. And these demands for renegotiation can be backed up by strikes or threats of strikes by the current employees. This, we submit, places an unfair burden on the employer.

The Act contemplates that the determination of the wages and benefits representing the mutually agreed upon value of an employee's services shall be made at the time these services are being performed. While payment of a part of the total wage and benefit package may be deferred until after retirement, the determination of the total value should not be subject to reopening after the employee has retired. At the time of performance of the employee's services, the

parties can best determine their value in the context of the current economic facts of the business and the wage and benefit levels then extant. It would be increasingly difficult for employers to operate their businesses in the face of such a wide-open contingent wage cost liability.

This inequity was referred to by both Member Zagoria and by the court below. The court said:

> "Once retirement benefits have been bargained for, earned, and become payable, the employer may not recant on his contractual obligation to pay them. Section 301, Labor-Management Relations Act, 1947, 29 U.S.C. § 185(a) (1964) . . . Changing economic facts relating to the employer's business or the general economy occurring after an employee retires cannot enhance or depreciate the value of his prior services or justify periodic post-retirement negotiations. The employer cannot retroactively increase his prices to compensate for these increased benefits, or fund expenses which are, as these would be, open-ended." (A. 199-200).

It must be recognized that there are limits to the ability of a private employer to escalate indefinitely retirement programs already costing large sums to provide protection against economic inflation. This employer has from time to time voluntarily, and within the limits of its available resources, upgraded benefits for thousands of retirees under a variety of plans at different locations. These private plans are generally recognized as valuable supplements to governmental programs financed by the economy as a whole, such as social security and Medicare. But, the larger share of the burden of an inflationary economy can only be

shouldered as a part of the general tax burden in which all corporations and citizens share. The unspoken premise of the Board decision that a larger share of this burden should fall on the individual employer has led the Board to seek by a tortured construction of the Act to impose a mandatory bargaining obligation to achieve what it considers a desirable social goal. While the goal of better security for retired persons is laudable, it is questionable whether the Board's ruling would advance that goal. In any event, the Board can not amend the Act to accommodate the Board's view of social need.

V

INDUSTRY PRACTICE WAS NOT MADE A PART OF THE RECORD AND CONSTITUTES NO USEFUL GUIDE

The Union and Employer *amici* disagree as to the extent of industry practice in permissively negotiating changes in benefits for retirees. We point out that the various representations made as to industry practice are all *ex parte,* and there is no evidence in the record whatsoever on this score. Thus, while we do not question the good faith of the statements, we do believe that if industry practices were to be given any weight, they should have been explored and clarified in an evidentiary hearing.

The references to industry practices in the various briefs are not definitive and reliance upon them is hazardous, and especially so because of the wide range of practices that exist and because of the lack of definitiveness in the terms "discuss", "bargain" and "negotiate." We know from long personal experience that these terms have different meanings to different persons in different contexts, and they do not always

express a common meaning. Some employers as a matter of labor relation policies discuss many matters with their unions and reach various mutual understandings with them on a wide variety of subjects. They do not consider these talks, discussions and understandings as bargaining or negotiating, and they do not consider that these voluntary actions and arrangements flow from any mandatory requirement of law.

It is easy to confuse much of this practice with negotiation. But there is a vast difference in permissively and voluntarily undertaking to achieve mutual understandings on labor matters on a broad front and in accepting a mandatory bargaining obligation and all the consequences that flow therefrom. What is done permissively and voluntarily is subject to limitation and to some measure of discretion on both sides. These discussions which are handled permissively and voluntarily can be carried on informally and in an atmosphere of mutual freedom from legal restraints.

But mandatory bargaining for retirees is a wholly different matter. If bargaining is mandatory, all matters pertaining to these benefits, as the Board's decision here illustrates, must be bargained and the issue can be used to deadlock agreement overall and lead to strikes and lockouts.

The development of voluntary arrangements between employers and unions, as the court below said, is to be encouraged, but any rule of construction that uses the voluntary practices of some as a ground for fashioning a mandatory requirement for all would obviously inhibit the development of voluntary practices

in other areas of labor-management relations. Moreover, as the court below also said,

> "This voluntary practice demonstrates the increasingly humanitarian quality of the labor-management relationship, and is to be encouraged. However, it does not form a basis on which this Court can alter the statutory language, or undermine the Congressional intent." (A. 200).

CONCLUSION

The Judgment of the Court of Appeals should be sustained.

Respectfully submitted,

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APPENDIX

APPENDIX

Labor-Management Relations Act, 1947, as amended (29 U.S.C. §§ 152, 158-159), consisting of:

Definitions

SEC. 2. When used in this Act—

* * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Unfair Labor Practices

SEC. 8(a). It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Representatives and Elections

SEC. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority

of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

SEC. 9(b). The Board shall decide in each case whether, in order to assure the employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . . .

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to

him a claim to be recognized as the representative defined in section 9(a);

The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Syllabus

ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 *v.* PITTSBURGH PLATE GLASS CO., CHEMICAL DIVISION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 70-32. Argued October 20, 1971—Decided December 8, 1971*

A labor organization which was the exclusive bargaining agent for employees "working" on hourly pay rates at one of respondent Company's facilities had negotiated with the Company an employee health insurance plan in which retired employees participated. Upon enactment of Medicare the Union sought mid-term bargaining to renegotiate the insurance benefits for retired employees. The Company, maintaining that Medicare made the insurance program useless and that retirees' benefits were not a mandatory subject of collective bargaining, stated that it would offer each retiree a stated monthly amount toward supplemental Medicare coverage. When, despite Union objections, the Company made the offer, the Union filed unfair labor practice charges with the National Labor Relations Board (NLRB). The NLRB concluded that the Company was guilty of unfair labor practices in violation of §§ 8 (a) (5) and (1) of the National Labor Relations Act (NLRA) and issued a cease-and-desist order. The NLRB held that the benefits of already retired employees were a mandatory subject of bargaining as "terms and conditions of employment" of the retirees themselves and, alternatively, of the active bargaining unit employees. It also held that the Company's "establishment of a fixed, additional option in and of itself changed the negotiated plan of benefits" contrary to §§ 8 (d) and 8 (a) (5) of the Act. The Court of Appeals for the Sixth Circuit disagreed with the NLRB and refused to enforce its cease-and-desist order. *Held:*

1. Retirees' benefits are not, within the meaning of §§ 8 (a) (5) and 8 (d) of the NLRA, a mandatory subject of bargaining as "terms and conditions of employment" of the retirees. Pp. 163–176.

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* *Together with No. 70-39, *National Labor Relations Board* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, also on certiorari to the same court.